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IN THE

Supreme Court of the United States

October Term, 1991

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL UNION NO. 76,

Petitioner,

v.

DAVE AND BEVERLY FOWLKES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTIONS PRESENTED

1. Did the state court fail to apply governing federal law when:

(a) it held "unfair," under union bylaws superseded by a labor agreement, union hiring hall practices which complied with the labor agreement?

(b) it affirmed a judgment grounded on evidence showing at most negligence without examining the sufficiency of the evidence under correct standards?

2. Did the court below err by not barring, under the limitations period of *DelCostello v. Teamsters*, 462 U.S. 151 (1983), an unfair representation claim against the union unaccompanied by a contract claim against an employer brought over eighteen months after the claim accrued?

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OPINIONS BELOW

The opinion of the Washington State Court of Appeals, including its rulings on Petitioner's motion for reconsideration, is reported at 58 Wn. App. 759, 795 P. 2d 137 (1990, on motion for reconsideration 1991). The notation of denial of Petitioner's petition for review by the Washington Supreme Court appears at 117 Wn. 2d 1019 (1991).

JURISDICTION

The Washington Supreme Court denied review on October 2, 1991. No rehearing was requested. This Court has jurisdiction under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS

Labor Management Relations Act, 29 U.S.C. § 185(a):

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

National Labor Relations Act, 29 U.S.C § 160(b)(excerpt):

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the [National Labor Relations] Board . . . shall have power to issue . . . a complaint stating the charges . . . *Provided*, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . .

STATEMENT OF THE CASE

Local 76 ("Union") was party to a multi-employer labor agreement containing hiring hall provisions governing the referral of employees. Employees qualified for the two highest referral categories by passing a journeyman examination or an apprenticeship program. Employees possessing neither qualification were placed in a lower referral category and referred to work after the higher priority lists were exhausted. The parties recognized one exception for "Class D" wiremen, who were entitled to referral from the highest category although they did not satisfy either qualification criterion.

The labor agreement defined the qualifying journeyman examination as "written and/or practical examinations given by a duly constituted Local Union of the IBEW." The Union, without employer objection, offered only written examinations.

Under the agreement, the Union was obliged to refer employees according to the contract terms regardless of internal Union rules, bylaws, "or any other aspect or obligation of Union membership policies or requirements." The Union bylaws provided:

> The handling of jobs for unemployed members shall be under the full supervision and direction of the Business Manager's office. He shall devise such means as he considers practical and fair in distributing available jobs to such members, if they are qualified to do the work.

Respondent Fowlkes before 1982 had worked for signatory Union employers but had not signed the hiring hall books. He had not served an apprenticeship, and twice failed written wireman examinations. In 1982, he quit work and asked the Union to place him on the highest referral list. The Union placed him on a lower referral list because he did not qualify for the two highest lists. He was not a Class D wireman.

After failing to obtain work, Fowlkes asked the Union for help so that he could pass the written journeyman examination. After meeting with Union representatives, Fowlkes expected that the Union would provide him with some specific guidance on how best to prepare for the test. The Union provided a list of subjects with which he should be familiar. Fowlkes believed that the listing was inadequate. He attended the written examination in May 1983, but left without attempting to complete it. He later withdrew from Union membership and found work elsewhere.

Fowlkes sued the Union over eighteen months later, in February 1985. He disavowed any claim of breach of the labor agreement. He claimed instead that the Union violated its bylaws by placing him on the lower referral list. He argued that he was qualified by virtue of his job experience and should have been offered a practical rather than written examination. He also contended that the Union did not provide him with

adequate help to pass the examination, and that he should have the benefit of the exception previously made for Class D wiremen.

Before trial, the Union moved for summary judgment on the ground that suit was time-barred under *DelCostello v. Teamsters*, 462 U.S. 151 (1983). The motion was denied. The jury awarded Fowlkes $100,000, and judgment was entered. In its motion for judgment notwithstanding the verdict, the Union argued that the evidence was insufficient to support the verdict and that the claim was time-barred.[1] The motion was denied.

On appeal to the state Court of Appeals, the Union assigned error to the above orders on the sufficiency of the evidence and the statute of limitations. The Court of Appeals characterized the case as follows (App. B-9):

> This case is cognizable in state court, either as a claim based on a collective bargaining agreement, or as a claim based on the duty of fair representation, premised on a breach or arbitrary enforcement of the union bylaws.

The Court acknowledged that federal law governed (App. B-6, 8).

The appellate court affirmed. Overlooking the post-judgment motion,[2] the Court ruled that the claim of insufficiency of evidence was not raised in the trial court

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[1] The Union in its Motion for Judgment Notwithstanding the Verdict argued that "there was no evidence or reasonable inference from the evidence to justify the verdict[.]" In its memorandum supporting the post-judgment motion, the Union argued that "[t]he Trial Court [erred] by denying the Defendant's Motion for Summary Judgment based upon a lapse of the Statute of Limitations."

[2] The motion for judgment notwithstanding the verdict and its supporting memorandum were contained in the Clerk's Papers submitted to the appellate court.

(App. B-14). It observed in dictum that the evidence supported a fair representation claim for arbitrary hiring hall practices (*ibid.*). The Court initially ruled that it would not apply *DelCostello* retroactively (App. B-12). On the Union's motion for reconsideration, the Court adopted a different theory: that *DelCostello* governed a suit against the Union only but would not be applied in the instant case. The court again failed to note the Union's showing that the sufficiency of the evidence argument had been preserved (App. C).

The Union petitioned the Washington Supreme Court for review. On October 2, 1991, that Court, without opinion, denied review (App. A).

REASONS FOR GRANTING THE WRIT

I. Review is Warranted Because The State Court Decision Disregarded Governing Supreme Court Authority And Threatens The Enforceability of Labor Agreements.

A. *The Union's Adherence To The Terms Of Its Labor Agreement, In Lieu Of Abiding By Superseded Union Bylaws, Was Not "Wholly Irrational Or Arbitrary" Under Airline Pilots v. O'Neill, 499 U.S. __, 113 L. Ed 2d 51 (1991).*

The Union's labor contract established two qualifications for referral from the highest priority hiring hall lists. Fowlkes satisfied neither. The Union and the signatory employer group recognized an exception for one group of electricians. Fowlkes did not fit within the exception. The Union contract expressly superseded Union bylaws. Fowlkes eschewed any claim under the labor agreement. Notwithstanding the supremacy of the labor contract, Fowlkes prevailed under the bylaws "fairness" provision. He recovered damages for Union action which complied with the labor agreement. The state court acknowledged

that fair representation principles applied,[3] but failed to correctly apply them.

The decision below denies the Union its necessary authority to negotiate for those it represents. The labor agreement, not the bylaws, was the source of the Union's referral obligations. The Union's business manager, empowered by the bylaws to devise "practical and fair" referral procedures, did so by negotiating a labor contract and obtaining membership ratification. Under a bylaws provision, the Union membership agreed through contract ratification that union policy would not govern hiring hall referrals. Fowlkes nevertheless obtained a large award for a Union act which complied with its contract obligations.

The Union's bargaining authority practically was nullified by the state court's decision, as it was penalized for abiding by its negotiated agreement. Likewise, the continued effectiveness of the contract referral procedure is threatened as any Union referral action is subject to the whim of an outsider's view of "fairness."

Those are the practical implications which warrant review. Review is compelled also because the state court's decision conflicts with long-standing federal labor law. The Court long has granted unions broad discretion to negotiate. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)("a wide range of reasonableness must be allowed"). *Air Line Pilots v. O'Neill*, 499 U.S.____, 113 L. Ed 2d 51 (1991) strengthens union authority to negotiate. Analogizing to the restrictive standard of review of legislative enactments, the Court in *O'Neill* reasoned (113 L. Ed 2d at 65):

> [T]he final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly

[3] "[S]ince the fairness provision of the bylaws was a necessary part of [the jury's] decision, fair representation and contract issues have become intertwined in this case." 58 Wn.App. 759, 769, 795 P.2d 137 (App. B-11).

> characterized as so far outside a "wide range of reasonableness," *Ford Motor Co. v. Huffman*, 345 U.S. at 338, that it is wholly "irrational" or "arbitrary."

As a matter of law, it is not "wholly irrational" to set qualification standards for electricians which are subject to objective verification. Nor is it irrational to establish an exception for one group while not extending it to another. *O'Neill* stated: "Congress envisioned the relationship between the courts and labor unions as similar to that between the courts and the legislature," citing to decisions establishing standards for judicial review of legislative enactments. Unions therefore, like legislatures, may classify without strict judicial supervision:

> [T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. [Citations omitted]

Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 489 (1955)(Equal Protection challenge to legislative classification).

The state court's decision is irrational even if the classification of Class D wiremen were deemed erroneous. The remedy is to order the cessation of the non-conforming practice, rather than to effectively eliminate the contractual standards.

This Court should grant the writ because the state court failed to apply federal labor law. No issues of union politics or other invidious discrimination are presented. This instead is a case where a state court entered a large judgment because a union adhered to the job referral provisions of a negotiated agreement. If *O'Neill* and *Huffman* are to have meaning for unions negotiating labor agreements, the state court decision cannot stand.

B. ***The State Court Failed To Determine Whether The Union's Other Supposed Errors Breached The Duty Of Fair Representation.***

Fowlkes also contended that the Union's test was too difficult and that the Union did not do enough to help him pass the exam. The state courts repeatedly refused to review the sufficiency of the evidence against the governing standards of *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)("arbitrary, discriminatory, or in bad faith") and *United Steelworkers v. Rawson*, 495 U.S.____, 109 L. Ed 2d 362, 375 (1990)(negligence does not establish breach). Its refusal was unwarranted, since the Union preserved its issue in a post-judgment motion and directed that the court clerk provide the documents to the appellate court.

Fowlkes complained that the test was unrealistically difficult. Yet Union electricians are referred to jobs varying in complexity from nuclear projects to small commercial buildings. Fowlkes could not properly claim that a uniform test be geared to his own job aspirations and skills. Fowlkes' evidence concerning test preparation was vague: the Union would "give him some guidance giving him some specificity" as to what he should study. The Union's provision of a list of subjects may have been negligent, but was not a breach of duty.

Review therefore is warranted because the state court ignored its obligation to apply governing federal fair representation doctrine. The Union, despite three levels of state appellate review, has yet to have its conduct examined under applicable federal law. This Court should exercise its supervision to assure that federal labor law is uniformly applied.

II. The State Court Refused To Apply The Federal Limitations Period For Fair Representation Suits On The Ground That Fowlkes Made No Contract Claim Against An Employer. Review Is Warranted As the Decision Conflicts With *DelCostello v. Teamsters*, 462 U.S. 151 (1983).

Fowlkes' claim accrued in May 1983, close to two years before he filed suit (App. B-12). The state court agreed that the federal limitations period applied to the subject matter of the suit (App. B-9). Applying Ninth Circuit precedent, the court initially held that *DelCostello v. Teamsters*, 462 U.S. 151 (1983) would not be applied retroactively (App. B-12). When the Union on reconsideration pointed to conflicting Ninth Circuit authority, the court shifted its ground (App. C). It then held that *DelCostello's* applicability to a 'non-hybrid' claim against a union alone was not reasonably foreseeable at the time, and would not be applied to Fowlkes (App. C-2).

Once again, the state court misapplied federal law. *DelCostello's* choice of the NLRB six-month period was based on the similarity of an unfair representation claim to an unfair labor practice charge "made by workers against unions." 462 U.S. at 170. The presence of a claim against the employer in *DelCostello* was fortuitous. *DelCostello*, moreover, soon was applied to suits brought only against a union. *Erkins v. Steelworkers*, 728 F. 2d 837 (11th Cir. 1984), *cert. denied* 467 U.S. 1243; *Rodman v. Hensley*, 740 F. 2d 665 (8th Cir. 1984), *cert. denied* 471 U.S. 1016. Nothing in the case justified the state court's refusal to apply the governing federal law limitations period.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted this 27th day of December, 1991.

HUGH HAFER
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Attorneys for Petitioner

APPENDIX A

THE SUPREME COURT OF WASHINGTON

DAVID FOWLKES and BEVERLY FOWLKES, Respondents, v. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 76, Petitioner.	No. 58369-2 C/A No. 11269-8-II

This matter came before Department I of the Court on its October 1, 1991, Motion Calendar on Petition for Review. Department I having considered the Petition and the files herein;

Now, therefore, it is hereby

ORDERED:

That Petition for Review is denied.

DATED at Olympia, Washington this 2nd day of October, 1991.

s/ FRED H. DORE
CHIEF JUSTICE

APPENDIX B

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DAVID FOWLKES and BEVERLY FOWLKES, husband and wife, Respondents, v. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 76, Appellant.	No. 11269-8-II DIVISION TWO FILED: August 13, 1990

PETRICH, J. – Dave Fowlkes brought this action, denominated by his counsel as a common law action sounding in contract/tort, in state court against the International Brotherhood of Electrical Workers, Local 76. A jury returned a verdict of $100,000 for Fowlkes, from which Local 76 appeals. Local 76 claims that state court jurisdiction was preempted by the jurisdiction of the National Labor Relations Board (Board); that the suit was barred by the six-month statute of limitations of section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b); that the complaint should have been dismissed because of Fowlkes's failure to exhaust available union remedies; and finally, that the evidence was insufficient to support the verdict. We affirm.

Local 76 is a signatory to a collective bargaining agreement with the Southwest Washington Chapter of the National Electrical Contractors Association. The agreement, which is binding on Local 76 and assenting employers, contains provisions governing employment referral. Under the agreement, employment applicants are registered in the highest of four groups for which they qualify.[1] Applicants in the highest group are given priority for job referral, followed by those in successive groups.

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[1] The collective bargaining agreement between the Southwest Washington Chapter of the National Electrical Contractors Association and IBEW, Local 76, provides in article 3, section 3 as follows:

> The Union shall maintain a register of applicants for employment established on the basis of the Groups listed below. Each applicant for employment shall be registered in the highest priority Group for which he qualifies.
>
> JOURNEYMAN WIREMAN-JOURNEYMAN TECHNICIAN
>
> GROUP I. All applicants for employment who have four (4) or more years' experience in the trade, are residents of the geographical area constituting the normal construction labor market, have passed a journeyman's examination given by a duly constituted local union of the I.B.E.W. or has been certified as a journeyman wireman by any Inside Joint Apprenticeship and Training Committee and who have been employed for a period of at least one (1) year in the last four (4) years under a collective bargaining agreement between the parties to this Agreement.
>
> GROUP II. All applicants for employment who have four (4) or more years' experience in the trade and who have passed a journeyman's examination given by a duly constituted local union of the I.B.E.W. or has been certified as a journeyman wireman by any Inside Joint Apprenticeship and Training Committee.
>
> GROUP III. All applicants for employment who have two (2) or more years' experience in the trade, are residents of the geographical area constituting the normal construction labor market and who have been employed for at least six months (6) in the last three (3) years in the trade under a collective bargaining agreement between the parties to this Agreement.
>
> GROUP IV. All applicants for employment who have worked at the trade for more than one (1) year.

To qualify in groups one and two, applicants must have passed a journeyman's examination or have been certified as a journeyman wireman by an apprentice and training committee. The agreement defines examination as "written and/or practical examinations, given by a duly constituted local union of the IBEW." Local 76 has administered only written examinations.

Local 76 must refer applicants for jobs according to the provisions of the collective bargaining agreement notwithstanding conflicting provisions in the union constitution or bylaws. Of the constitution and bylaws, only the bylaws contain any reference to employment referral. They state at Article XIV, § 7 as follows:

> The handling of jobs for unemployed members shall be under the full supervision and direction of the Business Manager's office. He shall devise such means as he considers practical and fair in distributing available jobs to such members, if they are qualified to do the work. Members violating any rule or plan established shall be penalized as decided by the Executive Board.

There was evidence at trial that a group of between 20 to 25 Local 76 members had been qualified as journeymen without having taken the examination or having been certified by an apprentice and training committee. These members, known as Class D wiremen, had been hired as non-union employees by employers when Local 76 was out of referrals. Once employed, they became union members subject to the collective bargaining agreement. Under a directive from the international union, Class D wiremen who had been working a minimum of four years were certified as journeymen wiremen.

Fowlkes belonged to Local 76 during most of his career as an electrician, which began in the 1950's. Although he had never taken the journeyman's examination, Local 76 referred him for work with Groff Electric as a journeyman in

the early 1970's. He worked at Groff Electric in that capacity for 11 years.

When work slowed at Groff Electric in 1982, Fowlkes sought new work through Local 76. However, he was not allowed journeyman status because he had not passed the Local's written journeyman's examination, and thus he fell outside of groups one and two. Fowlkes was not thereafter referred for work.

Upon Fowlkes's request, the executive board of Local 76 agreed to provide him with study materials or a tutor to assist him in passing the journeyman's examination. Fowlkes contacted the international union when the promised assistance did not come through. The northwest representative of the international union then met with Fowlkes, his attorney, and the Local 76 business manager. At this meeting it was agreed that Local 76 would provide Fowlkes with information specifying subjects he should study. Thereafter, Fowlkes received one letter from the union. At trial, Fowlkes and his attorney testified that the letter was of no assistance. Fowlkes then attempted to take the examination but did not complete it, feeling he could not pass.

After attempting to obtain work through Local 76 for about eight months, Fowlkes began looking for non-union work, which he quickly obtained. He commenced this action in February 1985.

STATE COURT'S JURISDICTION

On appeal, Local 76 argues for the first time that the state court's jurisdiction was subject to preemption by the exclusive jurisdiction of the Board. The United States Supreme Court held in *San Diego Building Trades Council v. Garmon*, 359

U.S. 236, 245, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959), that in the absence of an overriding state interest such as the maintenance of domestic peace, state and federal court jurisdiction is pre-empted by the exclusive primary competence of the Board when the activity which is the subject matter of the litigation is arguably protected or prohibited by the provisions of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* The Court stated that preemption is essential "if the danger of state interference with national policy is to be averted." *Garmon*, 359 U.S. at 245.

Local 76 contends that the crux of this suit is an allegation of a discriminatory hiring hall practice, a matter normally within the exclusive jurisdiction of the Board. *See Local 100 of the United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690, 10 L. Ed. 2d 638, 83 S. Ct. 1423 (1963). Although Local 76 is tardy in raising the preemption issue, the issue concerns the subject matter jurisdiction of the state court and may be considered for the first time on appeal. *See International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 393, 90 L. Ed. 2d 389, 106 S. Ct. 1904 (1986) ("A claim of *Garmon* pre-emption is a claim that the state court has no power to adjudicate the subject matter of the case, and when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court.").

Fowlkes responds to the preemption claim by arguing that he sued Local 76 on § 7 of the bylaws, which brought this suit within § 301(a) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a), an exception to *Garmon* preemption. That section provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . ., or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties,

> without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).[2]

State and federal courts have concurrent jurisdiction over a breach of contract action under this statute, *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 7 L. Ed. 2d 483, 82 S Ct. 519 (1962), but federal substantive law is controlling, *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 102, 7 Ed. 2d 593, 82 S. Ct. 571 (1962).

The Supreme Court held in *Smith v. Evening News Association*, 371 U.S. 195, 9 L. Ed. 2d 246, 83 S. Ct. 267 (1962), that the word "between" in § 301 referred to contracts, not suits. Therefore, to invoke federal court jurisdiction under § 301, the suit had to be on a contract between an employer and a labor organization, or between labor organizations. The *Smith* court held that a suit by a union member against his or her employer for breach of a collective bargaining agreement is judicially cognizable under § 301.

Over the years, the concept of what constitutes a contract between labor organizations or between a union and an employer has been expanded. *See United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. v. Local 334*, 452 U.S. 615, 69 L. Ed. 2d 280, 285-86, 101 S. Ct. 2546 (1981); *Kinney v. International Brotherhood of Elec. Workers*, 669 F. 2d 1222 (6th Cir. 1981) (union constitution is a contract

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[2] The trial court's instructions to the jury indicate, as well, that Fowlkes sued on a theory of breach of contract. Instruction number 5 explains that the local union's by-laws are the written terms of the contract of membership. Instructions numbers 6, 7, and 8 explain the burden of proof concerning a contract, the requirements for finding a breach of contract, and the duty to mitigate damages, respectively. Instruction number 9 explains the elements of an oral contract.

between international and local union); *Beriault v. Local 40, Super Cargoes & Checkers of the IL&WU*, 501 F. 2d 258 (9th Cir. 1974) (agreement supplementing collective bargaining contract is a 301 contract); and *Gable v. Local Union No. 387*, 695 F. Supp. 1174, 1177 (N. D. Ga., 1988) (by-laws are an addendum to contract between the union and the employee/union member). No court has held that such a contract is not required, however.

In this case, there is such a contract: the collective bargaining agreement, as supplemented by the by-laws. The collective bargaining agreement provided for the establishment of the priority groups for referrals. It provided that assignment to Group I would be based on the passing of an examination given by the local union or certification by an apprentice and training committee. The by-laws authorized the business manager's office to distribute jobs in a fair and practical manner. Fowlkes contended that union officials acted arbitrarily in insisting that he pass a written examination, while qualifying certain other members as journeymen on the basis of experience. That is clearly a challenge to the implementation of both the by-laws and the collective bargaining agreement.

Neither should the fact that Fowlkes did not specifically allege a violation of the collective bargaining agreement preclude this argument. *See Lewis v. Local Union No. 100 of the Laborers Int'l Union*, 750 F. 2d 1368, 1373 (7th Cir. 1984), in which the court held that Lewis's failure to explicitly allege a breach of contract did not preclude the claim, since Lewis had alleged sufficient facts to support it. This suit is authorized under § 301 if it is brought to protect rights conferred by the collective bargaining agreement. *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 29 L. Ed. 2d 473, 490-91, 91 S. Ct. 1909 (1971). These rights can be based upon agreements supplementary to the collective bargaining contract. *Beriault*, 501 F. 2d at 262. Fowlkes's challenge to the implementation

of the by-laws asserted denial of the right of a priority referral. It clearly implicated the collective bargaining agreement.

There is another basis supporting jurisdiction of the superior court in this case. The facts here are consistent with a claim that Local 76 breached its duty of fair representation. Such a breach occurs when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. *See Vaca v. Sipes*, 386 U.S. 171, 17 L. Ed. 2d 842, 857, 87 S. Ct. 903 (1967). Hiring hall conduct may breach this duty if the determination of an employee's referral status is arbitrary or is affected by irrelevant criteria. *See Conley v. International Brotherhood of Elec. Workers, Local 639*, 810 F. 2d 913 (9th Cir. 1987) (employee demoted from Book 1 to Book 2 because he lived outside a certain area); *Lewis v. Local Union No. 100 of the Laborers Int'l Union, supra* (union failed to refer Lewis to jobs of same duration as other employees); *Bleier v. NLRB*, 457 F. 2d 871 (3d Cir., 1972) (change of referral qualifications to require a written examination and failure to provide some sort of "grandfather" clause for employees who would lose a long-standing priority status was found not to be unfair in the absence of any credible evidence of discrimination or unequal treatment).

Fowlkes's claim is at least partially based on what he asserts was unequal treatment. The complaint, itself, alleges arbitrary conduct. This is enough to satisfy the prerequisites for an unfair representation claim.

The NLRB has declared that a breach of the duty of fair representation is also an unfair labor practice, under 29 U.S.C 157 and 158.[3] The Supreme Court has apparently acquiesced in this view, but has held that unfair representation claims are not subject to pre-emption. *Vaca v. Sipes*, 386 U.S. at 188.

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[3] *NLRB v. Miranda Fuel Co.*, 140 NLRB 181 (1962), *enforcement denied*, 326 F. 2d 172 (2nd Cir. 1963).

Local 76 contends that Fowlkes cannot take advantage of this exception to pre-emption because he did not base his case on such a claim. Indeed, Fowlkes specifically stated that his was not a fair representation case. However, jurisdiction is based on the nature of the case. It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdictions. Rather, it is the concern with delineating *areas of conduct* which must be free from state regulation if national policy is to be left unhampered. *Association of Journeymen v. Borden*, 10 L. Ed. 2d at 644. If the facts presented indicate that the subject of the cause of action is one which the court has authority to adjudicate, that is sufficient. *See Motor Coach Employees v. Lockridge*, 29 L. Ed. 2d at 489-90 (In answer to the lack of jurisdiction defense, Lockridge sought to raise an issue of fair representation after his state court verdict was appealed to the Supreme Court. The court held that such a claim might preserve jurisdiction, but that the evidence presented did not support it.); *Lewis*, 750 F. 2d at 1373 (failure to allege a breach of contract does not preclude claim). A breach of a purely intra-union contract could constitute unfair representation. The facts presented here were sufficient to support such a theory.

This case is cognizable in state court, either as a claim based on a collective bargaining agreement, or as a claim based on the duty of fair representation, premised on a breach or arbitrary enforcement of the union by-laws.

STATUTE OF LIMITATIONS

Determination of the applicable statute of limitations for section 301 suits is based on federal law. *International Union, United Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 16 L. Ed. 2d 192, 197, 86 S. Ct. 1107 (1966). Ordinarily where no limitations period is specified, it is proper to apply the most

closely analogous state limitations period. However, when a rule from federal law clearly provides a closer analogy than available state statutes and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, it is appropriate to turn away from state law. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 76 L. Ed. 2d 476, 493-94, 103 S. Ct. 2281 (1983). The *DelCostello* court held that where section 301 claims and fair representation claims are "inextricably interdependent" and "implicate those consensual processes that federal labor law is chiefly designed to promote - the formation of the collective bargaining agreement and the private settlement of disputes under it," unfair labor practices limitations period of § 10(b) of the National Labor Relations Act (29 U.S.C. § 160(b)) should apply.

The *DelCostello* rule is a narrow exception to the general rule; in labor law or elsewhere, application of a federal statute will be unusual, and resort to state law remains the norm for borrowing of limitation periods. *Reed v. United Transport Union*, 488 U.S.____, 102 L. Ed. 2d 665, 674, 109 S. Ct. 621 (1989). The six-month statute applies only if the section 301 case is based on a fair representation claim. *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851, 95 L. Ed. 2d 791, 804-05, 107 S. Ct. 2101 (1987). Moreover, the fact that a fair representation claim is involved does not necessarily require application of the six-month statute of limitations to all claims. If the claims are not interdependent, different statutes can be applied. *See General Teamsters Union Local No. 174 v. Trick and Murray, Inc.*, 828 F. 2d 1418, 1423-24 (9th Cir., 1987). *Daigle v. Gulf State Utilities Co. Local No. 2286*, 794 F. 2d 974, 977 (5th Cir., 1986), *cert. denied*, 479 U.S. 1008, 107 S. Ct. 648 (1986).

In this case, there is language in the collective bargaining agreement, by itself, upon which a section 301 claim could be based, and arguably there is enough evidence in the record to

support such a claim. However, Fowlkes's case primarily focused on section 7 of the by-laws requiring that jobs be distributed in a fair and practical manner. To establish his claim of unfairness, Fowlkes introduced evidence concerning the Class D wiremen who were certified as journeymen wire men without having taken the examination or receiving certification from the apprenticeship committee, while he was denied such certification after having served competently as a journeyman wireman in the construction industry for several years; evidence that the written examination required by the Local had little or no application to journeyman electrician work in the trade; and that his extensive and successful employment in the trade justified a practical examination as allowed by the collective bargaining agreement, rather than the written one, to determine his qualification as a competent journeyman electrician.

When the essence of the complaint is that the union failed to act fairly on the member's behalf, it is so closely related to fair representation claims that the federal limitations statute should be applied. *See Conley v. International Brotherhood of Elec. Workers, Local 639*, 810 F. 2d 913, 915 (9th Cir., 1987).[4] Here, any contractual right to a practical examination arose from the collective bargaining agreement, but jury instructions excluded that document as a source for the rights alleged. That did not mean that the jury could not consider it, of course, and the jury could have found that the union's actions were unfair solely on the basis of the collective bargaining agreement. However, since the fairness provision of the by-laws was a necessary part of their decision, fair representation and contract issues have become intertwined in this case.

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[4] *Conley* is somewhat similar to this case. That complaint was also based on hiring hall practices. Conley had been demoted from Book I to Book II because he was not a resident of the proper geographical area. He alleged both breach of contract and violation of the duty of fair representation. The court found his to be a hybrid case and applied the six-month statute.

Nevertheless, the federal limitations statute need not be applied in this instance. The Ninth Circuit court has held that *DelCostello* is not to be applied retroactively to hybrid fair representation - Section 301 cases unless its effect would be to lengthen the otherwise-applicable state statute of limitations. *Aragon v. Local No. 572, International Brotherhood of Teamsters*, 750 F. 2d 1447, 1451 (9th Cir., 1985), *cert. denied*, 474 U.S. 902, 88 L. Ed. 2d 229, 106 S. Ct. 229 (1985); *Glover v. United Grocers, Inc.* 746 F. 2d 1380, 1382 (9th Cir., 1984); *Bower v. Bunker Hill Co.*, 675 F. Supp. 1254, 1257 (E.D. Wash., 1986). The determination is based upon the date on which the cause of action accrued. *See Aragon*, 750 F. 2d at 1450.

The union contended below that Fowlkes's cause of action arose in November, 1982, when union officials refused to let him sign Book I. Certainly, it had accrued by May 11, 1983. By that time, Fowlkes had acquired an attorney, had met with the executive board and the representative from the International office, had asked to be placed on the list in Book I, had been told that he must take the test and that he would be given some kind of assistance in preparing for it, had received whatever assistance the union was inclined to provide, and had seen the examination and determined that he could not pass it. *DelCostello was decided on June 8, 1983.* Fowlkes's cause of action had accrued by then. The federal statute of limitations is shorter than the applicable state statute. The *DelCostello* rule does not apply to this case. The State statute of limitations controls.

EXHAUSTION OF REMEDIES

Local 76 contends that this case was not appropriately before the court because Fowlkes had failed to exhaust the grievance procedures available in the union constitution. According to the union, article 27, section 12 of the union constitution provides for an appeal to the vice-president by

any member who feels the local union has treated him unjustly. (The record does not include a copy of the constitution.) Additionally, article III, section 14 of the collective bargaining agreement provides an appeals committee to hear complaints arising out of the referral process.

Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(4) (1982) states, in relevant part:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency. . . *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a 4-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organization or any officer thereof. . .

The general rule requiring members to exhaust internal remedies before instituting court proceedings does not give the union authority to compel the members to pursue internal remedies before resorting to the courts. Rather, it grants the court discretionary power to stay proceedings if it determines that internal union procedures should be exhausted. *Joinette v. Local 20*, 106 Wn. 2d 355, 360-61, 722 F. 2d 83 (1986). The decision not to stay the court proceedings was not only reasonable, but required. Fowlkes had presented his case to both local and International officials. He had spent eight months attempting to resolve the problem without success, and there was nothing in the record to suggest that further efforts would be worthwhile. Since the union provides no authority to require a member to spend more than four months exhausting internal remedies, *see NLRB v. Industrial Union of Marine and Shipbulding Workers of America and its Local 22*, 391 U.S. 418, 20 L. Ed. 2d 706, 713, 88 S. Ct. 1717 (1968), the trial court's decision to permit the case to go forward was the only proper one.

Finally, Local 76 argues that the evidence is insufficient to support the verdict. It insists that a fair representation claim is premised on a claim that the union breached its duty by wrongfully negotiating the collective bargaining agreement. It argues that there was no evidence of dishonesty or any improper ulterior motive on the part of the union in negotiating the agreement.

Our review of the record fails to disclose that the claim of insufficiency of the evidence to support the verdict was ever presented to the trial court in a motion for a new trial, or otherwise. The burden of supplying the record rests on Local 76. *Allemeier v. University of Washington*, 42 Wn. App. 465, 712 P. 2d 306 (1985). The appellate court reviews only questions passed upon by the trial court. Since on this record the claim of insufficiency of the evidence was not presented to the trial court, it is not subject to review. *Tacoma Grocery Co. v. Byron Barlow*, 12 Wash. 21, 40 P. 380 (1895).

Furthermore, even if we were to review this assignment, we are satisfied that this assignment lacks merit. It is true that earlier fair representation suits involved claims against unions for breach of their duty in negotiating a collective bargaining agreement. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 97 L. Ed. 1048, 73 S. Ct. 681 (1953). However, fair representation claims now embrace arbitrary and discriminatory hiring hall practices by the union. *Breiningan [sic] v. Sheet Metal Workers Int'l Ass'n Union No. 6*, ____ U.S. ____, 107 L. Ed. 2d 388, 110 S. Ct. 681 (1989). The evidence here was sufficient to support such a claim.

Affirmed.

s/ PETRICH, J.

WE CONCUR:

s/ WORSWICK, J. s/ ALEXANDER, C.J.

APPENDIX C

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DAVID FOWLKES and BEVERLY FOWLKES, husband and wife, Respondents, v. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 76, Appellant.	No. 11269-8-II DIVISION TWO ORDER AMENDING OPINION

Having considered the Motion for Reconsideration by the Union and Fowlkes' answer, the Court believes that the opinion filed August 13, 1990 should be modified, it is hereby

ORDERED that the opinion is amended as follows:

On page 12 after the end of the first partial paragraph there is noted footnote 5, which footnote reads:

> We are mindful of the decision in *Kelly v. International Brotherhood of Electrical Workers*, 803 F. 2d 516 (9th Cir. 1986), but do not find that it requires a different result. The *Kelly* court announced a general rule barring causes of action which arose prior to the decision in *DelCostello*

and which were not filed within six months of that decision. This rule does not apply without exception, however. When the *DelCostello* rule is extended to statutes or categories not previously addressed or reasonably foreseeable, plaintiffs should be given a reasonable amount of time after the announcement of the extension in which to file their claims. *See Kelly v. Burlington Northern R. Co.*, 896 F. 2d 1194 (9th Cir., 1990) (workers who sued employer and union for breach of collective bargaining agreement and breach of duty of fair representation under Railway Labor Act were entitled to a reasonable time after announcement of decision extending *DelCostello* to suits under the RLA); *International Ass'n of Machinists v. Aloha Airlines*, 790 F. 2d 727 (9th Cir., 1986) (*DelCostello* rule extended to cases arising under the RLA and to new category of case, involving a suit only against an employer, "one step removed from a hybrid breach of collective bargaining/fair representation action," but rule applied only to cases filed after *Aloha*); and *Stoltz v. United Brotherhood of Carpenters and Joiners*, 648 F. Supp. 1439 (D. Nev., 1986) (*DelCostello* not previously applied to cases arising under the LMRDA, so six-month limitation period not applied).

Before 1986, all of the cases to which the Supreme Court and the Ninth Circuit applied the *DelCostello* statute of limitations arose in the context of a breach of collective bargaining and fair representation claims, the kinds of disputes specifically found by *DelCostello* to require rapid resolution. In 1986, the six-month statute of limitations was applied to a slightly different situation, involving a suit by a union against the employer. *See International Ass'n of Machinists v. Aloha Airlines, supra.* Not until 1987, was the *DelCostello* rule extended to a case like Fowlkes' suit. *See Conley v. International Brotherhood of Elec. Workers, supra.* In 1985, when Fowlkes filed his action, he had no reason to believe that *DelCostello* applied to him. He was at least entitled to a six-month grace period after the announcement of the decision in *Aloha Airlines* (or, in this case, the three-year state statute of limitations, which would be the shorter of the two periods).

Also on page 12 after the completed paragraph on the page, there is noted footnote 6 which footnote reads:

> The Union contends that the applicable state statute of limitations is not the three-year period for contract cases, but the three-month period for suits seeking to vacate arbitration awards. It is clearly wrong. Its argument is based on *United Parcel Services v. Mitchell*, 451 U.S. 56, 67 L. Ed. 2d 732, 101 S. Ct. 1559 (1981) and its progeny, which applied the vacation of arbitration statute in cases involving suits asserting that the union had been negligent in handling employees' claims against the employer for breach of the collective bargaining agreement. *Mitchell* was never intended to apply to suits which did not involve issues pertaining to the grievance-arbitration procedure. *See United Parcel Service v. Mitchell*, 67 L. Ed. 2d at 740; *Singer v. Flying Tiger Line, Inc.*, 652 F. 2d 1349, 1353 (9th Cir., 1981). Thus, if the collective bargaining agreement does not provide for arbitration as the exclusive and final remedy for the issues being litigated, *Mitchell* does not apply. *Daigle v. Gulf State Utilities, Local 2286*, 794 F. 2d 974 (5th Cir., 1986). This was a member-union dispute. No arbitration provision applied to it. The three-month statute of limitations is clearly inappropriate.

IT IS FURTHER ORDERED, that the opinion as modified will be published.

DATED this 23rd day of April, 1991.

s/ PETRICH, J.

s/ ALEXANDER, J.
s/ WORSWICK, C.J.